No. 988

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SUPPLEMENTAL

TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District Of New Mexico

Filed May 9, 1957.

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District Of New Mexico

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Pleas And Proceedings Before The Honorable Carl A. Hatch, United States District Judge For The District Of New Mexico, Presiding In The Following Entitled Cause:

THE ELGIN CORPORATION, Plaintiff

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Defendant.

No. 3054, Civil.

107] First Amended Designation Of
Record On Appeal.

Pursuant to Rule 75 (a) the Appellant for its First Amended Designation of Record on Appeal hereby designates the following portions of the record, proceedings and evidence to be contained in the record on its appeal from the final judgment herein:

1. Complaint filed herein on January 4, 1956, as amended by interlineation pursuant to order entered on February 15, 1956.

2. Defendant's Answer to Plaintiff's Application for Preliminary Injunction filed herein on January 19, 1956.

3. Affidavit of Milton W. Stovall and Erwin H. Hahn filed herein on January 30,1956.

4. Defendant's Original Answer filed herein on February 29, 1956.

5. Interrogatories by Plaintiff to Defendant, Nos. 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 39 and 40 filed herein on March 6, 1956 and defendant's answers to same filed herein on March 22, April 17, June 27 and August 7, 1956.

6. Portion of transcript of pre-trial conference, pages 77-81 and 86, entered herein on September 27, 1956, in lieu of a pre-trial order, insofar as same pertains to leave granted defendant to amend its answer and to plaintiff to move to strike same and to serve further interrogatories.

7. Further Interrogatories by Plaintiff to Defendant, Nos. 1, 2, 3, 4, 5 and 9, filed herein on September 14, 1956, and defendant's answers to same filed herein on October 8, 1956.

108] 8. Plaintiff's Motion to Strike filed herein on October 4, 1956.

9. Plaintiff's Amended Motion to Strike filed herein on October 8, 1956.

10. Order Denying Motion to Strike, entered herein on October 25, 1956, as of October 8, 1956.

11. The testimony in question and answer form of Milton W. Stovall when called as a witness for Appellee.

12. Plaintiff's Requested Instructions numbered 5, 6, 7 and 8.

13. The Court's Instructions to the Jury.

14. Plaintiff's objections to the Court's Instructions to the Jury.

15. Verdict of the jury.

16. Judgment entered by the clerk on October 19, 1956.

17. Final judgment entered on October 25, 1956.

18. Notice of Appeal filed November 15, 1956.

19. Order Extending Time filed herein on December 10, 1956.

20. First Amended Statement of Points on which Appellant relies, served herewith.

21. This designation.

Dated December 29, 1956.

Dee C. Blythe
Hubert O. Robertson

Certificate Of Service

I certify that a copy of the foregoing instrument was mailed this 29th day of December, 1956, to defendant's counsel of record.

Dee C. Blythe

Filed Dec. 31, 1956.

109] Additional Designation Of Record On Appeal.

Pursuant to Rule 75 (a) the defendant hereby designates the following additonal portions of the record, proceedings and evidence to be included in the record of the appeal by the plaintiff from the final judgment herein:

1. Amended Answer of defendant.

2. All of the exhibits which were introduced at the trial on the merits and which were received in evidence by the Court.

3. All of the testimony of the following witnesses in the trial on the merits in question and answer form: Robert Elgin, Joe B. Turner, Milton W. Stovall, Thomas W. Foy, Ervin H. Hahn, William Parish, William Russell, Harold Bishop, Howard Cearley, N. N. McCrary, J. V. Glenn, W. E. Johnson, Joe Hannawalt, Carl Hansen,R. R. Ellerson.

4. Defendant's motion to dismiss at the close of the plaintiff's case.

5. Defendant's motion to dismiss at the close of all of the evidence.

6. The requested instructions of the defendant.

110] 7. The defendant's objections to the instructions of the Court.

8. This additional designation.

Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham

We Hereby Certify That We Have Mailed A Copy Of The Foregoing Pleading To Opposing Counsel Of Record This Jan - 7 1957

Rodey, Dickason, Sloan,
Mims & Akin
By John P. Eastham

Filed Jan. 7, 1957.

114] Clerk's Certificate.

United States Of America, District Of New Mexico.

I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby Certify:

That the attached and foregoing pages numbered 1 to 113, inclusive, are the original pleadings, orders and other documents specified in the Designations of the Record on Appeal by the appellant and appellee in that certain civil action lately pending on the docket of said court entitled and numbered as shown by the title page of this record, except as diminished by an Order For Diminution of the Record purportedly entered in the United States Court of Appeals, Tenth Circuit, a copy of which appears at page 111 of this record.

I do further Certify: That the Reporter's Transcripts of a Pre-Trial Conference and of the Court's Instructions to the Jury and Objections to the Court's Instructions, separately bound but forming a part of this record, are the originals of said Transcripts as certified by the Reporter and filed in my

office in said cause.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Albubuquerque, in said district, on this the 12th day of February, 1957.

(Seal)

Wm. D. Bryars
Clerk of said Court

Filed United States Court of Appeals Tenth Circuit, February 18, 1957, Robert B. Cartwright, Clerk.

In the United States Court of Appeals for the Tenth Circuit.

Thirtieth Day, March Term, Wednesday, May 1st, 1957.

Before Honorable Sam G. Bratton, Chief Judge

The parties having stipulated that the Amended Answer of Defendant, filed in this action on October 4, 1956, was inadvertently omitted from the Order for Dimunition of the Record entered on February 27, 1957, and it appearing that said Amended Answer is essential to the determination of the issues in this case.

It Is Ordered that the clerk of the District Court of the United States for the District of New Mexico be and he hereby is authorized and directed to prepare a Supplemental Record containing said Amended Answer and to certify same to the clerk of this Court.

Done at Albuquerque, New Mexico, this 29th day of April, 1957.

S-1] Amended Answer Of Defendant.

First Defense

That the plaintiff's Bill of Complaint fails to state a claim against defendant upon which relief can be granted.

The Elgin Corp. vs. The Atlas Building Products Co.

Second Defense

(1) Defendant denies all the allegations contained in paragraphs 5, 6, 8, 9 and 10 of plaintiff's Bill of Complaint.

(2) Defendant agrees that the principal product in the concrete cinder building block business is the 8" x 8" x 16" block; but it says that it makes many other kinds and sizes of block most of which plaintiff does not make. Defendant also says it has bid with contractors on block and many jobs and has obtained the contract to supply block on many of those jobs, and that defendant's prices have varied from time to time and place to place. Defendant knows of only one job on which it bid and on which plaintiff also bid, and in that instance plaintiff was the successful bidder, but defendant was never advised of the price bid by plaintiff. Except as the foregoing statements relate to allegations in paragraph 7 of plaintiff's complaint, all allegations in paragraph 7 are denied. Defendant particularly alleges that it has not sold block at less than cost, nor has it transported or caused to be transported block at less than cost; and that it has not given discounts or rebates off of the price at which it has sold block to its customers in New Mexico.

S-2] (3) Defendant says that only a small part of the block sold by it in New Mexico have been sold in competition with plaintiff.

(4) Defendant denies that it systematically has sold to dealers and contractors in New Mexico at prices lower than prices at which sales were made by defendant in Texas to dealers and contractors either by reason of actual lower prices or by reason of discounts and rebates. Defendant says that its sales to contractors in the area in which plaintiff does business have been for prices as high as the prices at which a large and substantial part of the defendant's sales to contractors in Texas have been made and were sold at prices higher than the prices at which plaintiff sold or offered to sell. Defendant further says that it has not so far as it knows sold to dealers below the price at which plaintiff sold to dealers and in this connection further says, that prior to the time of the filing of this suit, plaintiff had not known at what price or prices plaintiff sold to dealers or contractors. Defendant further says that generally speaking, defendant's block has

been sold in the Silver City area at a price higher than plaintiff's block has been sold or offered for sale in said area; and defendant further says it generally has been able to sell and has sold its block in the Silver City area for a higher price than plaintiff sold or offered to sell its block; and that factors other than price entered into defendant making its said sales at such higher prices such as, but not limited to, the quality of the respective block.

(5) Defendant denies that it has done any acts the effect of which may be substantially to lessen competition or tend to create a monopoly in a line of commerce or to injure, destroy or prevent competition by plaintiff with defendant, and further says that no legal liability for damages is imposed by law upon defendant for any acts which "may" result in certain conditions or which "tend" towards certain conditions, as acts which "may" result in, or "tend" toward certain conditions also "may not" result in or "tend" toward such conditions, and are, therefore, not illegal; and a tendency toward a condition which is illegal is not unlawful, but is unlawful only if acts are done with the intent they shall result, or actually do result, in the proscribed conditions; and plaintiff may not recover any damages unless as a proximate result of acts which are unlawful, plaintiff has suffered actual damages.

S-3] Third Defense

Comes now defendant and pleads in bar of the alleged cause of action asserted by plaintiff the four-year statute of limitation of the Statutes of Limitation of the State of New Mexico, which four-year statute is here specially plead in bar of said alleged cause of action asserted by plaintiff.

Fourth Defense

Comes now defendant and specially pleads in bar of the alleged cause of action asserted by plaintiff the statute of limitation contained in the Acts of the Eighty-fourth Congress of the United States of America, being chapter 283-Public Law 137, of the Acts of the Eighty-fourth Congress.

Fifth Defense

That if the defendant has discriminated in prices, which

discrimination is specifically denied, such discrimination was made in good faith to meet an equally low price of a competitor.

Wherefore, defendant prays that it have the judgment of the Court that the plaintiff take nothing by its suit, that judgment be entered in favor of the defendant, that the defendant recover its costs herein and for such further relief as to the Court may seem just.

Burges, Scott, Rasberry & Hulse
And
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham
Attorneys for Defendant, The Atlas Building Products Co.

Filed Oct. 4, 1956.

S-4] Clerk's Certificate.

United States Of America, District Of New Mexico.

I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby Certify:

That the attached and foregoing is the original of the Amended Answer of the Defendant filed in my office in that certain civil action lately pending on the docket of said court entitled and numbered as shown on the title page of this record and is transmitted to the United States Court of Appeals, Tenth Circuit, as a Supplemental Record on Appeal pursuant to an order of the United States Court of Appeals dated April 29, 1957, a duly attested copy of which is on file in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Albuquerque, in said district, on this the 7th day of May, 1957.

(Seal)

Wm. D. Bryars
Clerk of said Court

Filed United States Court of Appeals Tenth Circuit, May 9, 1957, Robert B. Cartwright, Clerk.